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No. 99-5739

In the Supreme Court of the United States

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government concedes (Br. 15) that "Congress * * * entrust[ed] the courts" to determine "whether particular kinds of property bear the requisite commercial nexus" to support application of Section 844(i). But the government asks this Court to jump straight to the constitutional issue, without properly considering whether the particular nexus that Congress specified is met. Although a firm delineation of constitutional limits may be desirable, it is not necessary here. Section 844(i) does not reach arson of a private residence.

The government's constitutional position is equally misguided. The government asserts (Br. 13) that the commerce power authorizes federal regulation of essentially all "crimes against property," because those crimes impose "predictable financial harms" on firms participating in the "interstate economy." When Congress regulates conduct that is neither interstate nor commercial, the risk of overstepping the bounds of the federal system is especially severe. Yet the government does not even try to identify a plausible dividing line "between what is truly national and what is truly local." *United States* v. *Lopez*, 514 U.S. 549, 567-568 (1995). The government does not adduce a single instance of conduct that, under its view, falls outside federal power to regulate arson. Cf. *id.* at 565. The extreme breadth of the government's position is not surprising, as only sweeping power could support the prosecution here.

The parties share some common ground, however. The government does not dispute that its expansive interpretation of the jurisdictional element in Section 844(i) renders meaningless the provision of Section 844, as enacted, that covered buildings used by federal agencies or recipients of federal funds. See Pet. Br. 22-23. The government also leaves untouched our extensive demonstration (*id.* at 20-22) that, under this Court's decisions and the many statutes using the same terms, the phrase "activity affecting interstate commerce" invariably refers to ***commercial*** activity by a business or similar enterprise, not transactions by isolated consumers. These points

foreclose a conclusion that Congress clearly intended to include arson of private residences within Section 844(i).

As for the constitutional question, the government does not dispute that the inclusion of a jurisdictional element cannot expand the commerce power. But that would be the result of the government's position here. And the government does not dispute that, under its view of the Commerce Clause (Br. 42 n.18), Congress could preempt state jurisdiction over the great bulk of crimes against property, so that only federal sufferance would permit the States to act in that core area of their sovereignty. For these and the other reasons discussed below, Section 844(i) cannot be applied constitutionally here.

The line to be drawn in this case is clear, whether it is drawn on statutory or constitutional grounds. Arson of property not used for any commercial activity is not a federal crime.

I. A PRIVATE RESIDENCE IS NOT "USED * * * IN ANY ACTIVITY AFFECTING INTERSTATE * * * COMMERCE"

The government misstates the question of statutory interpretation here. The question is not whether Section 844(i) "categorical[ly] exclu[des]" private residences from its scope (U.S. Br. 13; see *id.* at 19 n.6), but whether private residences come within the statute's terms in the first place. They do not.

A. The government tries to force the constitutional issue, claiming that Congress clearly intended Section 844(i) to encompass private residences, and that therefore this Court cannot construe the statute to avoid the significant constitutional question posed by such an assertion of federal power. In the government's view, when the words "affecting commerce" appear, this Court cannot analyze a jurisdictional element's other terms. But statutory interpretation begins with ***all*** the words of the statute. *Bailey* v. *United States*, 516 U.S. 137, 144-145 (1995). Even if the phrase "affecting interstate * * * commerce" in isolation might invoke constitutional limits, Section 844(i) does not reach all arson affecting commerce or

all property affecting commerce. Rather, as this Court has recognized, *Russell* v. *United States*, 471 U.S. 858, 862 (1985) the statute interposes additional limits: covered ***property*** must be "***used*** * * * in an ***activity*** affecting interstate * * * commerce." This Court should construe that entire phrase in context according to normal rules of construction, and reject the government's invitation to seize on one fragment to conclude that the statute reaches as far as the Constitution may permit.[1]

The government relies (Br. 16) on a statement in the 1970 House Report that "the term affecting * * * 'commerce' represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.'" H.R. REP. NO. 91-1549, at 70 (quoting *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963)). But the government ignores the rest of that sentence, which limits the coverage of the "very broad provision" to "substantially all ***business*** property." 1970 House Report at 70 (emphasis added). Half a sentence in a committee report scarcely amounts to a clear statement of congressional intent that precludes prudent statutory construction — particularly when the second half of the sentence points the other way.

Interpreting Section 844(i) to exclude private residences does not "resurrect the 'business purposes' limitation." U.S. Br. 26. As the government acknowledges (*ibid.*), the "business purposes" language was dropped not to extend coverage to private residences, but in an effort to encompass public buildings used for non-profit enterprises such as "schools, police stations, and churches." Commercial "use" is broader than use "for business purposes." When residential real estate is rented, the physical property may not be used "for business purposes" in the normal sense, but it nonetheless is used in a commercial

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[1] The government suggests (Br. 17) that this Court narrowly construes statutes to avoid constitutional doubt only when facial invalidity is at stake. That is not so. *E.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (narrowly construing statute where agency "construction of the statute, as applied in this case, poses serious [constitutional] questions").

"activity." The House Report shows that Congress still had "business property" in mind after deleting "business purposes."

The debates belie any congressional intent — much less clear intent — that Section 844(i) cover private residences. The government tries in vain (Br. 29) to explain away Chairman Celler's unambiguous statement, made in the final debate, "that the mere bombing of a private home would not be covered" by the statute because Congress sought to ensure that the legislation stayed within constitutional limits. 116 CONG. REC. 35,359 (1970). The government cites (Br. 26) some sentiment that residences "***ought*** to be covered" (emphasis added), but can produce no statement claiming that Section 844(i) ***did*** reach private residences. To the contrary, minutes before passing the bill, the House defeated an amendment designed to extend federal jurisdiction whenever "someone's residence was blown up." 116 CONG. REC. 35,359 (statement of Rep. Hungate). The proposal reflected a commonsense understanding that residences "frequently" would not be used in any activity affecting interstate commerce. *Ibid.*

B. Far from reflecting clear intent to encompass private residences — and thus forcing the constitutional issue, *DeBartolo*, 485 U.S. at 575 — the jurisdictional element cannot bear the meaning that the government would give it without departing from ordinary English. The government identifies three "activities" in which the Walker residence purportedly was "used": (1) the "underwriting and servicing of mortgage loans" (Br. 10); (2) "the underwriting and administration of casualty insurance" (Br. 21); and (3) "supplying natural gas" (Br. 22).[2] The Walker residence was not "used" in those activities under

[2] The government suggests that consuming natural gas is an activity affecting interstate commerce within the statute (Br. 10), and that even the "activities of the occupants within" the Walker home were *ipso facto* activities affecting interstate commerce because they affected "the volume of gas provided to the residence." *Id.* at 22. That reasoning would extend federal power to all human activity.

the "ordinary, commonsense meaning" of the term. *United States* v. *Johnson*, No. 98-1696, slip op. 4 (Mar. 1, 2000).

The government asks (Br. 23) this Court to interpret the word "used" in light of the breadth of the word "any" and the supposedly "settled legal significance" (Br. 17) of the words "affecting commerce." But the government is silent in the face of our demonstration (Pet. Br. 20-22) that only a business or similar enterprise is an "activity that affect[s] commerce, within the meaning of [this Court's] decisions" and Congress's prior usage. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 276-277 (1995).[3] Being connected to a gas line, being insured, and being mortgaged are not "activities" of that or any other kind. See *United States* v. *Ryan*, 41 F.3d 361, 369-370 (8th Cir. 1994) (en banc) (Arnold, C.J., dissenting), cert. denied, 514 U.S. 1082 (1995).

The government tries (Br. 19-24) to throw a federal cloak around every action tangentially affecting the natural gas, mortgage lending, and insurance industries. But explicit federal regulation of these industries under the Commerce Clause has stopped well short of the scope the government would infer from the general terms used in Section 844(i).[4] It would be

[3] *E.g.*, *Allied-Bruce*, *supra* (pest control service); *Russell*, *supra* (rental); *Reliance Fuel*, *supra* (oil sales and distribution); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (insurance); *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1944) (same); *McLain* v. *Real Estate Board, Inc.*, 444 U.S. 232 (1980) (real estate financing and sale); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498 (1942) (natural gas distribution).

[4] Federal regulation of natural gas has been confined to transportation and sales transactions before a pipeline delivers gas to the local main, a limit derived from this Court's Commerce Clause decisions. See *Federal Power Comm'n* v. *East Ohio Gas Co.*, 338 U.S. 464, 469-470 & n.10 (1950); 15 U.S.C. § 717. The Commerce Clause permits federal regulation of insurance "transactions," *South-Eastern Underwriters*, 322 U.S. at 552, not of any object that may be insured or any behavior that might affect insurance. Federal lending

bizarre to assume that, in an ***arson*** statute, Congress intended to expand the federal sphere in those fields.

The government's argument also ignores this Court's recent decisions recognizing that the word "used" denotes some kind of ***active*** employment. See Pet. Br. 18-20. The government's reluctance to confront *Bailey* speaks volumes. Indeed, the government's argument here resembles its failed contention in *Bailey* that a gun was "used" whenever its presence "emboldened[ed]" a drug dealer. 516 U.S. at 145. The government also avoids *Smith* v. *United States*, in which this Court construed "use" based on meanings that do not help the government here: "to convert to one's service" or "to derive service from." 508 U.S. 223, 229 (1993). To "derive service from" a building presupposes instrumental use of the physical facility. See Pet. Br. 18-20. Thus, the "proper inquiry is into the function of the building," *i.e.*, the "use of the structure itself." *United States* v. *Ryan*, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., dissenting), partly superseded, 41 F.3d 361 (1994) (en banc), cert. denied, 514 U.S. 1082 (1995).

The government makes much (Br. 20-21) of this Court's conclusion in *Russell* that rental property is "used" within the meaning of Section 844(i). But in *Russell* as in *Smith*, the property at issue was physically traded — handed over "as an item of barter" in *Smith*, 508 U.S. at 229, and its daily possession traded for a regular stream of rental payments in *Russell*.[5] "Renting" a building "to tenants" (*Russell*, 471 U.S. at 862) actively employs it in a commercial activity in a way that paying for it, insuring it, and heating it do not. Real property

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regulation under the Commerce Clause extends to conduct related to credit transactions, not to any act that affects any subject of or security for a loan. *E.g.*, 15 U.S.C. § 1601 *et seq*.

[5] The building owner in *Russell* "earned * * * income" from the "use" of the property and "treated it as business property for tax purposes." 471 U.S. at 859. Moreover, in *Russell* this Court did not have to consider construing Section 844(i) more narrowly to avoid constitutional issues, as no constitutional challenge was raised.

that is rented to tenants is not passively used as some kind of "investment resource" (U.S. Br. 11); rather, the structure — the thing that is burnt — is "used" as a situs of revenue-generating activity (*i.e.*, paid tenancy) and as a source of revenue. By contrast, pledging the property as collateral for a mortgage (see *id.* at 20) does not "use" the physical premises in an income-generating "activity" — much less in the type of business pursuit that Congress and this Court have considered activities that substantially affect interstate commerce. See note 3, *supra*; Pet. Br. 20-22. The discrete act of subjecting the property to a security interest may change its legal status, but does not "use" the property in an ongoing "activity."

The government cannot identify even a hint in the legislative history that passive receipt of interstate utilities, passive subjection of the property to a security interest, or the maintenance of insurance might be an "activity" for which property is "used." Much less can the government support its contention that, under Congress's intended meaning, the mortgage company "used" the residence to lend money on it, the insurance company "used" the home to insure it, and the gas company "used" the house to deliver gas to it. That is not how people talk, and not how statutes should be construed. In light of the constitutional doubt created by the government's sweeping interpretation, Section 844(i) should be construed more naturally to exclude private residences from its scope.

II. THE COMMERCE POWER PROVIDES NO BASIS FOR PROHIBITING ARSON OF REAL PROPERTY NOT IN COMMERCIAL USE

The government tries to excise "commerce" from the Commerce Clause. Rather than offer a "practical conception of commercial regulation," *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring), the government treats this Court's precedents as abstractions, transforming the power to regulate commerce among the States into the power to regulate anything with economic significance. "The subject of federal power is still 'commerce,'" however, "and not all commerce but commerce

* * * among the several States." *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U.S. 453, 466 (1938) (Hughes, C.J.). When Congress attempts to regulate "an activity beyond the realm of commerce in the ordinary and usual sense of that term," *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring), the connections between that activity and interstate commerce must be especially "close and substantial * * * to justify federal intervention." *Santa Cruz Fruit*, 303 U.S. at 466. It is "essential to the maintenance of our constitutional system," *ibid.*, that the standard of substantiality prevent the Commerce Clause from serving as a means to plenary federal power. See *Lopez*, 514 U.S. at 566-568. That principle defeats the prosecution here.

A. The Application Of Section 844(i) To The Arson In This Case Would Extend Federal Regulation Of Intrastate Conduct Beyond The Limits Recognized By This Court

Because the inclusion of a jurisdictional element cannot expand the commerce power — a point the government does not dispute — the application of Section 844(i) to this case must fail. The Commerce Clause empowers Congress to regulate only "three broad categories of activity," *Lopez*, 514 U.S. at 558, none of which encompasses this case. First, Section 844(i) indisputably does not regulate a channel of interstate commerce. Second, as applied to a private residence, Section 844(i) does not "regulate" or "protect" any "instrumentalities of interstate commerce, or persons or things in interstate commerce," *Lopez*, 514 U.S. at 558, within the meaning of this Court's decisions. Third, the statute does not regulate "activit[y] having a substantial relation to interstate commerce," which this Court defines as "intrastate economic activity * * * that substantially affect[s] interstate commerce," *id.* at 558-559.

The government tries to blend and expand the second and third categories to confer federal power to protect any activity, commercial or not, that has some nexus to interstate commerce. But the Commerce Clause does not stretch so far.

1. In a novel argument, the government asserts (Br. 34) that Congress's authority to "protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," somehow supports the exercise of the commerce power in this case. *Lopez*, 514 U.S. at 558. But not every "property having connections to interstate commerce" (Br. 34) comes within this power. Apparently taking its cue from *The Wizard of Oz*, the government likens (*ibid.*) the Walker residence to an "aircraft." Vehicles, bridges, train stations, and other transportation or communications infrastructure indeed are instrumentalities. See *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 212 (1959). Under a greatly expanded view, any place of business might be an instrumentality. But a private residence surely is not. Likewise, real property, which cannot move between the States, is not a "thing" in interstate commerce as that concept has been understood by this Court. Cf. *Perez* v. *United States*, 402 U.S. 146, 150 (1971) (prohibition of "thefts from interstate shipments" exemplifies this power).

That Congress may protect property that makes interstate commerce possible, and property that is flowing in interstate commerce, does not mean that it has power to protect all property the disposition of which has out-of-state effects. The former, recognized power is necessary and proper for the maintenance and control of interstate commerce, and is "congruen[t] and proportional[]" to the enumerated power. *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) (construing Fourteenth Amendment, Section 5); see *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966) (equating standards of Section 5 and the Necessary and Proper Clause). The latter is far afield from the interstate "commercial nexus" that, the government concedes (Br. 15), must undergird any exercise of the commerce power. Adverse effects on particular "financial interests" (*id.* at 39) do not threaten the conduct or integrity of interstate commerce.

2. The government asserts power to protect not just instrumentalities and things in interstate commerce, but activities that affect interstate commerce. Indeed, in this case, the

government claims that Congress can protect any property that affects any activity that affects interstate commerce, and thus can regulate any conduct (*e.g.*, arson) that affects property (*e.g.*, a residence) that affects an activity (*e.g.*, consumer behavior) that in some way affects interstate commerce.

The government carries a limited principle too far. Only the need to ***protect*** interstate commerce makes it at all necessary and proper for Congress to extend regulation to intrastate activities that merely ***affect*** interstate commerce, see *United States* v. *Darby*, 312 U.S. 100, 118 (1941); *Lopez*, 514 U.S. at 555, the third category of activities subject to federal regulation under the Commerce Clause, *id.* at 559. Thus, Congress can regulate an "intrastate economic activity" that "substantially affect[s] interstate commerce" if the activity, unregulated, could undermine federal promotion or regulation of interstate commerce. *Ibid.*; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257-258 (1964); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 232 n.11 (1948).

But application of Section 844(i) to the Walker residence does not permissibly regulate "purely intrastate commercial activities that nonetheless have substantial interstate effects." *United States* v. *Robertson*, 514 U.S. 669, 671 (1995). Under this third category, this Court has approved only regulations governing a ***way of doing business*** — *i.e.*, a commercial activity — that substantially affects interstate commerce. Arson — all that is ***regulated*** here — is not such an activity.

The government claims (Br. 11), however, that the commerce power "includes the power to regulate" any "intrastate ***non***commercial activity that substantially affects interstate commerce" (emphasis added). By contrast, this Court has treated the power to regulate activities "affecting commerce" in terms that recognize the limited, commercial subject matter of the Commerce Clause. This branch of the commerce power permits regulation of additional "aspects of commerce" such as the "conduct of an enterprise," *Polish National Alliance*, 322 U.S. at 647, 650, and similar "purely intrastate commercial activities." *Robertson*, 514 U.S. at 671. Congress's prerogatives extend to "numerous commercial activities that substantially affect interstate commerce," *Lopez*, 514 U.S. at 566, but the Court has not recognized general federal authority to regulate noncommercial activity based on its interstate repercussions.

In contending (Br. 33) that the regulated activity "need not itself be commercial," the government relies on cases that did involve regulation of commercial activity. Thus, in *Wickard* v. *Filburn*, this Court approved federal regulation of a commercial activity involving a commercial commodity — a limit on the production of a commodity (wheat) that could be traded in commerce, including production for use to feed other items of commerce (livestock and poultry) that might be sold. See 317 U.S. 111, 118-119 (1942). (The regulation did ***not*** govern end-use human consumption. See *id.* at 118.) Likewise, in *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942), the regulated activity was the interstate sale of milk; the activity regulated in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), was employment in the production of steel and steel products.

In each of these cases, Congress subjected a mode of doing business to regulation. But no production, trade, service, or transportation is regulated here. To extend federal regulation to noncommercial intrastate conduct, based on the effects of that conduct on end-use consumption — or to protect a "resource" that simply has contractual value to interstate parties — would go far beyond *Wickard*. With or without a jurisdictional element, such regulation exceeds the commerce power.

The protective principle is not a separate and independent basis for additional federal regulation of any "violent noneconomic conduct that directly threatens property having connections to interstate commerce." U.S. Br. 34. The government tries to bootstrap one aspect of the protective principle on another, but Congress's authority to protect interstate commerce against burden or interruption does not permit the federal government to "protect" any property that may be used in an

"activity" that substantially affects commerce in any way, based simply on the interstate economic relationships that may touch upon that property. ***Any*** property has "connections to interstate commerce" (*ibid.*) if one looks hard enough, but that is not a sufficient basis for federal regulation.[6]

To accept the government's view would recognize federal power to enact national anti-vandalism and anti-burglary laws — not to mention laws against any violent crime committed against any customer or employee of any business. That, like the application of Section 844(i) in this case, would impermissibly extend Commerce Clause regulation to activity that is "only tangentially related to interstate commerce." *FERC* v. *Mississippi*, 456 U.S. 742, 758 n.23 (1982).

B. The Relation Between The Arson In This Case And Interstate Commerce Is Too Insubstantial To Support Federal Regulation Without Effectively Allocating Plenary Power Over Crime To The National Government

The government fails to come to grips with the Seventh Circuit's correct conclusion that the "pretty slight" connections here "don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." J.A. 41. The government insists (Br. 12) that "the connections between petitioner's crime and interstate commerce are neither attenu-

[6] By contrast, *National Organization of Women* v. *Scheidler*, 510 U.S. 249 (1994), involved extortion directed at shutting down commercial abortion services — an economic transaction aimed at "harming businesses" (*id.* at 260) — while the Freedom of Access to Clinic Entrances Act forbids purposeful efforts to block commercial transactions by enterprises engaged in interstate commerce. See U.S. Br. 35 n.14. The requirement of a purpose to obstruct or restrain commerce helps ensure that the link between the prohibited conduct and interstate commerce is substantial rather than tangential. *E.g.*, *Santa Cruz Fruit*, 303 U.S. at 465, 468-469; *Jones & Laughlin*, 301 U.S. at 40.

ated nor speculative," but they are not substantial under this Court's analysis.

1. *The United States Sidesteps The Governing Standard*

a. The government avoids contending that the relation between the conduct in this case and interstate commerce is substantial, as this Court requires, *Lopez*, 514 U.S. at 559, but rather seeks to meet a less-demanding standard of "significant" connection. Petitioner's arson does not pass the government's own test, however, which would require "intrastate violence" to be "connected in a ***significant*** way with ***commercial transactions***" before being subject to federal regulation. U.S. Br. 35 (emphasis added). Arson of the Walker residence — a building not used for any business or other public, commercial activity — was not significantly connected with any commercial transaction. It thus fails even the government's test unless ***all*** violence that in some way affects interstate economic interests satisfies the standard. By that measure, federal power extends to the mugging of anyone whose ability to pay a mortgage or a credit card balance is affected, whose medical bills are paid by an interstate insurer, or whose interstate employer is economically harmed by the victim's absence.

Indeed, the only "significance" of arson to interstate commerce that the government identifies (Br. 39) is the mere cost of the crime in "dollars and cents" to out-of-state parties. This Court rejected similar "costs of crime" reasoning in *Lopez*, 514 U.S. at 564, for the good reason that it erases all meaningful limits on federal power. All crime is expensive, but the interstate diffusion of that expense does not render it subject to federal regulation under the Commerce Clause. See *ibid.*[7]

[7] Where the qualitative connections to interstate commerce are as slight as those here, the quantitative effects would have to be gargantuan to render them sufficiently substantial, standing alone, to justify federal regulation. The relatively modest $75,000 of damage caused in this case (Br. 46 n.21) cannot make up for the remoteness of the relation between the regulated act and interstate commerce.

b. Although the government must place full constitutional weight on the jurisdictional element, it tries to avoid the required "case-by-case" inquiry. *Lopez*, 514 U.S. at 561. The government insists (Br. 13) that it need not "prove an actual effect on interstate commerce in every Section 844(i) prosecution" (emphasis omitted), and also claims (Br. 45 & n.21) that the effects on interstate commerce of a particular crime need not be substantial. But the jurisdictional element in a statute must ***demonstrate*** the constitutional tie between the subject of regulation and interstate commerce. Effects on interstate commerce need not be realized; attempts can be punished. Nonetheless, the particular effects on interstate commerce that confer jurisdiction must be of the type that would justify regulation under normal Commerce Clause analysis.

Contrary to the government's contention (Br. 44), Congress in this case did indeed "identify[a] particularized link[] to commerce that the government must prove" in each case. If an arson is to come within federal authority, the burned property must be used in an activity affecting interstate commerce in such a way that the arson of that property substantially affects interstate commerce (and thus is an activity that can be regulated under the Commerce Clause, see *Lopez*, 514 U.S. at 559).

The government claims (Br. 45 n.21) that "arbitrary outcomes" would result from requiring proof of a substantial effect on commerce in every individual case. But that is the constitutional role of a jurisdictional element, and is the only way to ensure constitutional application of a statute that plainly could not stand without a jurisdictional limitation. Section 844(i), like other such laws, relies on its "jurisdictional element" to "ensure, through case-by-case inquiry, that" the conduct "in question affects interstate commerce." *Lopez*, 514 U.S. at 561. If a "case-by-case inquiry" does not demonstrate the activity's substantial effect on interstate commerce, there is no basis for federalizing an intrastate crime, since there is no other source for the substantial effect on commerce that permits federal regulation. The government argues, in effect, that lacking a sufficiently close relation between the crime of arson and

interstate commerce in general, it should not have to show a substantial effect in a particular case either. To the contrary, requiring proof of a ***qualitatively*** substantial effect on commerce by the regulated conduct does not lead to "arbitrary outcomes," but to constitutional ones.

2. *The Effects Of Petitioner's Arson On Interstate Commerce Are Too Slight To Support Constitutional, Non-Plenary Federal Regulation*

a. The government does not seriously contend that petitioner's arson substantially affected interstate commerce, but principally argues (Br. 43-46) that the effects of all arson, aggregated together, have a sufficiently substantial effect to pass constitutional muster. The government cannot rely on any aggregation principle here.

Although the government complains that ***we*** "would limit" aggregation "analysis to circumstances involving commercial activity" (Br. 46), it is the decisions of this Court that have drawn that clear line between intrastate conduct that may be aggregated to support federal regulation and conduct that may not: the aggregation device covers only "regulations of ***activities that arise out of or are connected with a commercial transaction***, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561 (emphasis added). That is, only commercial activities that are the ***subject of regulation*** may be aggregated to justify regulation under the Commerce Clause. See Pet. Br. 30-44. The government cannot identify a single constitutional decision of this Court in which ***non***commercial activities were aggregated.

To compensate for this deficiency, the government again tries (Br. 33-36, 45) to stretch *Russell* beyond its limits — and the limits of the Constitution. First, the government mischaracterizes *Russell* as a constitutional decision, but Congress's power was not challenged in that case. Second, the government asserts that in *Russell* this Court approved federal regulation of "the class of activities that constitute the rental market for real estate." Br. 33 (quoting 471 U.S. at 862). But the government

cannot and does not explain how Section 844(i) regulates "the rental market for real estate," and, in any event, the Walker residence was not rented. Indeed, the government does not claim that Section 844(i) is part of any general regulation of interdependent commercial transactions like the regulatory regimes in *Wickard* and other cases. *Russell* provides no basis for extending the aggregation principle to the regulation of non-commercial activity.

b. The government concedes that the Commerce Clause may not be applied in a way that "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Br. 41 (quoting *Lopez*, 514 U.S. at 557). The jurisdictional element of Section 844(i) accordingly must be applied in a way that separates crimes that substantially affect interstate commerce, and come within federal power, from those that do not. See *Lopez*, 514 U.S. at 561-562. But the government's view leaves nothing significant on the non-federal side of the line.

Here, as in *Lopez*, the government's position makes it "difficult to perceive any limitation on federal power" in "criminal law enforcement * * * where States have been historically sovereign." 514 U.S. at 564. Unwilling to volunteer a single example of an arson that would not be covered under Section 844(i), the government does not try to demonstrate any limits on its conception of the commerce power, but asks this Court to take its word that there are limits somewhere. Acquiescence would abdicate the Court's duty to declare the limits of congressional power. *Id.* at 566; *United States* v. *Coombs*, 37 U.S. (12 Pet.) 72, 75 (1838) (Story, J.).

The government seems to believe that the commerce power is heightened whenever it is directed at property — even the most local of property — and that, if "economic damage" is "the very core of [an] offense" (Br. 39), Congress can prohibit it if any of the loss is borne outside of the State in which the property is located. The government contends (Br. 42) that federal power to regulate real property may rest on "legal and

financial arrangements made for its purchase, sale, or protection, or through the demands it directly places on interstate resources" (though the "demands" are not those of property, but of people engaging in commercial transactions).

If connections like this support assertion of the commerce power, similar reasoning would permit federal, potentially exclusive regulation of all, or nearly all, property crimes and crimes of violence. "Economic damage" is at the core of all property crimes, from robbery and burglary; to theft, embezzlement, and fraud; to malicious mischief and arson. Property of any consequence has some interstate nexus, either in its manufacture, its replacement, or its financing, while almost all individuals are engaged in interstate transactions that would be affected in some way by injury or death. In the government's view (Br. 42), not only setting fires, but breaking the window of any house in the United States could be a federal crime, because the Commerce Clause would include the power to protect the "physical integrity of property * * * based on its use in an activity affecting interstate commerce." Indeed, the government does not dispute that its view would support federal zoning regulations under the Commerce Clause, and federal prohibition of damage to items purchased on a revolving account or credit card. See Pet. Br. 25, 41.

The government asserts (Br. 43 n.19) that its position, while permitting federal regulation of basically all real property on the ground that "the interstate economy reaches, and vitally depends on, commerce with those buildings," nonetheless "does not mean that Congress may regulate all violent crime against persons on the theory that" injury to those persons "would likely reduce" their consumption of out-of-state goods. But the government is at a loss to say why not. It says only that the crime in this case "will disrupt an ongoing and continuous commercial relationship" with "***identified*** commercial actors" (*ibid.*) but the same reasoning would apply to crimes against most people as well. People have credit cards (and mortgages, and Book-of-the-Month Club memberships) that reflect ongoing relationships with "identified commercial actors"; they

are employed by "identified commercial actors"; they purchase food and utilities from "identified commercial actors." The government's rationale would permit federal regulation of any conduct that might affect any ***person*** engaged in any activity affecting interstate commerce and (under the government's broad view) almost everyone is so engaged.

c. The government's limitless conception of federal power to regulate property is necessary to its prosecution of this case, given the tangential connections between this arson and interstate commerce. The government maintains that the existence of a natural gas connection alone is enough to support exercise of the commerce power. But no element of its argument withstands scrutiny. It is well-established that interstate commerce in natural gas stops at the local main, see note 4, *supra*, rendering the effect on interstate commerce in this case trivial and severely attenuated.[8] The government also concedes (Br. 43) that a utility company — an ***intrastate*** entity here — "suffers no actionable harm as a result" of the burning of its customer's property. The only identified basis for federal regulation is the "aggregate commercial effect of all * * * reductions" in the flow of interstate gas shipments resulting from arson (*ibid.*), but aggregation is not available.

The interstate risk-spreading of insurance provides no more substantial basis for validating the application of Section 844(i) here. See *Lopez*, 514 U.S. at 564. The "pre-existing contractual arrangement" on which the government relies (Br. 39) had nothing to do with the conduct regulated here.[9] If merely

[8] If interruption of utility service is a sufficiently substantial effect on interstate commerce to support federal regulation, then Congress could regulate how and when individuals move their residence from one structure to another (because of arson or otherwise) — or children set out on their own — or those with second homes may or must open up or shut down each residence. That conduct has demonstrable interstate effects under the government's theory.

[9] In grasping for "distant repercussions" on interstate commerce, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554

causing "economic injury" to an out-of-state insurer by "trigger[ing]" a pre-existing "legal duty" brings third-party conduct within the federal purview (*id.* at 37), then the Commerce Clause permits imposition of a federal substantive law governing contracts and torts involving citizens of different States.

No less sweeping in its implications is the government's contention (Br. 39) that the "threatened financial interests" of an out-of-state entity provide a constitutional nexus. An activity's incidental effects on a financial relationship with out-of-state actors does not bestow federal power to regulate the activity, even if there might be power to regulate the underlying commercial transaction. If a security interest is enough to impose federal regulation over anything done to or with the secured property, federal regulation might extend to any conduct involving any property bought on an installment plan. Indeed, the government suggests (Br. 40) that out-of-state ownership of property justifies federal regulation of the property itself and any conduct affecting it. That cannot be right.

The government conflates acts that may cost interstate ***parties*** some money with acts "that can be expected to have a * * * direct deleterious effect on interstate ***commerce***." U.S. Br. 12 (emphasis added). But the Constitution's solicitude for the "legally protected interests of out-of-state commercial actors" (*id.* at 43) appears in the diversity jurisdiction provided in Article III, not in the Commerce Clause.

At a minimum, where property must provide the jurisdictional nexus for regulation under the Commerce Clause, and the property is not an instrumentality of commerce or traveling in commerce, federal power should extend only to property that is used in an income-generating enterprise in or substantially affecting interstate commerce. That test, which encompasses the "building used in profit-making activities" (U.S. Br. 33) in

(1935) (Cardozo, J., concurring), the government also strays from the sole commercial nexus recognized in the statute — the use of the property.

Russell, but not the Walker residence, ensures a "***genuine*** connection between a particular property and interstate ***commercial*** activity" (*id.* at 45) (emphasis added).

* * * * *

The government itself concludes (Br. 47) that, if interstate commerce touches every home — as it surely does every home that has heat, electricity, mail delivery, telephone service, a mortgage, or insurance — "[p]rotection of the home is * * * an appropriate subject of federal regulation." That statement starkly exposes the government's effort to assert federal power of what should be unimaginable breadth. Affirmance in this case necessarily would endorse that vision of federal preeminence in the enforcement of general criminal laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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